BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554



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| In the Matter of<br><br>Clarification/Amendment of Part 69, Uniform System of Accounts for Telecommunications Companies, Concerning Average Schedule Eligibility Status. | Undocketed |

# NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS' REQUEST FOR CLARIFICATION OR, ALTERNATIVELY PETITION FOR RULEMAKING, CONCERNING PART 69 ELIGIBILITY FOR AVERAGE SCHEDULE COMPANY STATUS

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November 8, 1990

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**NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS' REQUEST FOR CLARIFICATION OR, ALTERNATIVELY PETITION FOR RULEMAKING, CONCERNING PART 69 ELIGIBILITY FOR AVERAGE SCHEDULE COMPANY STATUS**

Pursuant to Sections 1.2, 1.41 and 1.49, or, alternatively, Section 1.401, of the Federal Communications Commission's ("FCC" or "Commission") Rules of Practice and Procedure, [1] the National Association of Regulatory Utility Commissioners ("NARUC") respectfully requests that the Commission clarify that a local exchange company ("LEC") must settle its interstate jurisdictional costs on the same basis it utilizes to settle its State-regulated intrastate costs, i.e., on either an "actual cost" or "average schedule" basis. Alternatively, should the Commission determine that clarification and/or interpretation of the current Part 69

[1] 47 C.F.R. Sections 1.2, 1.41, 1.49, and 1.401 (1990).

rules is not appropriate, NARUC petitions the Commission to initiate the correct rulemaking procedures, on an expedited basis, to amend Part 69 to assure consistency between the intra- and interstate jurisdictional settlement costs utilized by individual LECs. In support of these requests, NARUC states as follows:

## I.

## INTEREST OF NARUC

NARUC is a quasi-governmental nonprofit organization founded in 1889. Its membership includes governmental bodies engaged in the regulation of carriers and utilities from all fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands. The NARUC's mission is to improve the quality and effectiveness of public utility regulation in America. More specifically, NARUC is composed of, inter alia, State and territorial officials charged with the duty of regulating the telecommunications common carriers within their respective borders. As such, they have the obligation to assure the establishment of such telecommunications services and facilities as may be required by the public convenience and necessity, and the furnishing of service at rates that are just and reasonable.

Telephone companies that separate their interstate jurisdictional costs on the basis of average schedules, yet file cost studies for the purpose of separating their intrastate jurisdictional costs, could recover more than 100% of their total

costs. Clearly the potential for such overrecoveries, at ratepayer expense, impacts upon NARUC's State Commission members' ability to adhere to their respective mandates to serve the public interest.

## II.

## BACKGROUND

Part 69 [2] of the Commission's regulations establish a system for reimbursing LECs for the cost of that portion of local plant and service expense used to provide access to long distance carriers ("IXCs"). To determine these access charges, interstate costs must first be separated. Under the regulations, this separation is ascertained through an accurate and detailed analyses of the elements of unseparated costs pursuant to Part 36 of the Commissions regulations.[3]

Some companies can avoid the costs associated with these analyses by using "average schedules" to establish their costs for revenue settlement purposes. These schedules, purportedly representative of the costs of an "average" small local exchange carrier, were developed for very small independent telephone companies which lacked the expertise to, and/or could not justify the expense of, a separations cost study.

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[2] 47 C.F.R. Sections 69.1 to 69.611 (1989).

[3] 47 C.F.R. Part 36 (1990).

Historically, the use of average schedules was a matter left to the small independent telephone company's discretion. However, once a company went on "cost", it was not allowed to go back to average schedules in subsequent years. This rule was designed to prevent a company from exploiting the dual compensation methods, i.e., averages schedules and cost studies, by choosing, in any particular year, the one which yielded the most compensation.[4]

Since divestiture, some small companies have attempted to exploit the difference between these two methods of cost allocation in a different context - the jurisdictional cost separations that occur at the state and federal levels. Since July of 1988,[5] NARUC has recognized the problem posed by these LECs that (a) separate their INTERstate costs, and receive their interstate IXC settlements/access charges, on the basis of these average schedules, (b) yet file cost studies, in their state ratemaking proceedings, for the purpose of separating and establishing their INTRAstate costs. Such LECs could, at ratepayer expense, recover more than 100% of their total costs.

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[4] See, Sichter, James W., United Telecommunications, Inc., "The Transition to Access Charges and Access Charge Design" (August 7, 1990) at pages 16-17. 1990 NARUC ANNUAL REGULATORY STUDIES PROGRAM.

[5] **Resolution For Uniformity in Cost Allocations,** adopted July 27, 1988; **Resolution Accepting the Report of the Joint Board Staff on Cost Allocation,** adopted March 1, 1989; **Resolution Concerning Mixed Settlement Companies,** adopted July 25, 1990. The text of these resolutions is reproduced in full in Appendix A.

## III.

## DISCUSSION

**A. The FCC should assure that LECs that demonstrate their ability to bear the "burden of developing cost information" by using cost studies in their intrastate rate cases, are barred from using average schedules for their interstate settlements.**

**1 - An unstated premise basic to the framework of the FCC's Part 69 procedures is that interstate costs can be accurately determined. The regulations presume the use of Part 36 cost studies. As a general rule, Part 36 requires most LECs to obtain data on their unseparated costs by performing expensive cost studies.**

As the D. C. Circuit has acknowledged,[6] Part 69 procedures for setting access charges is premised upon the existence of some method of accurately separating the interstate costs from the total unseparated inter- and intrastate costs. The regulations presume the use of Part 36 cost procedures. As the court specifically noted in Alltel Corp. v. FCC:

> [I]deally - {part 69 requires} accurate and detailed analyses of the elements of unseparated costs.[7]

This is in accord with the generally accepted principle that costs should be assigned to the service/activity which causes those costs to be incurred. Thus, under its Part 36 regulations, and

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[6] See,e.g., City of Brookings Municipal Telephone Company v. FCC, 822 FCC F.2d. 1153, at 1157 (D.C. Cir. 1987), where the court notes that Part 69 "...assumes the availability of accurate cost data, the basic ingredient needed for the FCC's recipe...To determine interstate costs accurately, it is necessary to begin with reliable estimates of total intrastate and interstate costs..."

[7] Alltel Corporation v. FCC, 838 F. 2d 551, at 553 (D.C.Cir 1988).

related Part 69 regulations, the FCC has, as a general rule, required information from the LECs which can only be acquired through extensive cost studies.

> 2 - However, the FCC allowed the use of Average Rate Schedules, in place of the more accurate cost studies, "to avoid imposing the burden of developing cost information upon companies' which may be too small to perform the necessary cost studies."[8]

The FCC has allowed a derogation of its general requirement for accurate cost data for certain small companies. As the Court explained in Alltell, the determination of interstate costs requires expensive cost studies which are burdensome for small exchange carriers.

> As a result, the Commission's rules have traditionally allowed smaller exchange carriers to estimate some or all of their costs through the use of an average schedule' which adopts generalized industry data to reflect the costs of a hypothetical exchange company.[9]

> 3 - The FCC has attempted to limit the potential for cost overrecovery implicit in average schedule use by restricting eligibility to companies which lack the ability to bear the cost of studies.

Because average schedule estimates of a carrier's costs are not precise, there is the possibility that a carrier could recover an amount greater than their actual interstate costs. The FCC recognized this potential when it attempted to limit the

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[8] Alltel Corp. v. FCC, supra, at 553.

[9] Alltel Corp. v. FCC, supra, at 553 (citing NARUC v. FCC, 737 F.2d 1095, at 1127 (D.C. Cir. 1984)).

availability of average schedule method cost determination to certain categories of LECs. The limitation was based, in part, on an FCC inference that an average rate schedule LEC's affiliation with "cost" companies indicates the ability to bear the expense associated with cost studies. [10] In finding this inference unjustified, the D.C. Circuit indirectly approved the underlying rationale, i.e., companies that are able to bear the costs of separation studies should be required to perform those studies.[11]

**4 - If an individual company has already, or intends to, incur the expense necessary to develop Part 36-type cost data to establish its intrastate costs for an intrastate rate case, data that simultaneously allows it to establish its interstate costs, it cannot be a burden to present/develop those cost studies for interstate settlements purposes.**

Allowing those companies that file cost studies for the purpose of separating their intrastate jurisdictional costs to use of average schedules to determine their interstate access charges, would defeat the purpose of allowing average schedules. A company that already has, or expects to, perform cost studies to establish its intrastate costs, should have data which would permit it to perform cost studies pursuant to Parts 36 and 69 of the Commissions

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[10] **Average Schedule Order**, 103 F.C.C.2d at 1029-1030 (1986). See also, 49 Federal Register at 50,414, where the FCC observed that, in adopting its rule, it was "...guided by the perception that affiliates of commonly owned exchange carriers collectively possessed sufficient resources to perform those cost studies that would be required for computing interstate access charges."

[11] See, NARUC v. FCC, 737 F.2d 1095, at 1127-1129 (D.C. Cir. 1984); Alltel Corporation v. FCC, 838 F. 2d 551 (D.C. Cir. 1988).

rules. It is clear that such companies can "bear the burden" associated with providing those cost studies. No cost savings can be realized by using average schedules to determine interstate costs if a company performs cost studies for intrastate ratemaking purposes.

**5 - Assuring that LECs settle interstate jurisdictional costs on the same basis they utilize to settle State-regulated intrastate costs will, consistent with the intent of the Commission's regulations and its duties under the Communication Act, block a potential source for overrecovery of costs at ratepayer expense.**

As NARUC has noted in all three of its resolutions, companies that separate their interstate jurisdictional costs on the basis of average schedules, yet file cost studies for the purpose of separating their intrastate jurisdictional costs, could recover more than 100% of their total costs. One likely reason such companies have for not utilizing the more accurate cost study data for interstate access charge determination is the possibility of a significant overrecovery of costs. Clearly the potential for such overrecoveries, at ratepayer expense, is inconsistent both with the purpose of the Part 69 Average Schedule regulations and the Commission's responsibilities under the Communications Act.[12]

**B. The FCC should clarify that its Part 69 regulations require LECs to settle interstate jurisdictional costs on the same basis they utilizes to settle their State-regulated intrastate costs.**

**1 - Under the APA, the Commission can clarify its current regulations to prevent LECs from engaging in inconsistent state/federal settlement procedures.**

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[12] See, 47 U.S.C. Sections 151 and 201(b) (1982).

Section 4 of the Administrative Procedure Act ("APA"),[13] requires that rulemaking by an agency be preceded by a notice in the Federal Register at least thirty days before the effective date of the rule, and further requires that interested parties be provided an opportunity to participate in the rulemaking through submission of written data, views, or arguments. However, the APA exempts from this notice and comment procedure "...interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice."[14] NARUC respectfully suggests that its requested clarification falls within this category of exempt agency action.[15]

**2 - Even if the FCC finds that the requested clarification does not qualify as an APA interpretive rule, general statement of policy, or rule of agency organization, procedure, or practice, (i) the APA notice and comment requirements have been satisfied by the procedures adopted in FCC Docket No. AAD 9-1939, and (ii) Docket No. AAD 9-1939 is an appropriate forum to provide the requested clarification.**

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13 5 U.S.C. Section 553.

14 5 U.S.C. Section 553(b)(A).

15 Compare, the discussions of interpretive rules in American Postal Workers Union V. United States Postal Service , 707 F.2d 548 (D.C. Cir. 1983), cert. denied, 465 U.S. 1100, 104 S.Ct 1594, 80 L.Ed 2d (1984); Cabais v. Egger, 690 F.2d 234 (D.C. Cir. 1982) WWHT,Inc. v. FCC, 656 F2d 807 (1981); and Guardian Federal Savings & Loan Association v. Federal Savings & Loan Insurance Corporation, 589 F 2d 658 (D.C.Cir. 1978) to the discussions of statements of policy in Telecommunications Research and Action Committee v. FCC, 800 F.2d 1181 (D.C.Cir. 1986); American Bus Association V. United States, 627 F.2d 525 (D.C. Cir. 1980); Pacific Gas & Electric, 506 F.2d 33 (D.C. Cir. 1974); and the discussion of "rules of agency organization, procedure and practice" in Batterton v. Marshall, 648 F.2d 694, 707 (D.C.Cir. 1980).

On September 14, 1989, Mid-Plains Telephone Company, Inc. (Mid-Plains) filed a petition for declaratory ruling with the FCC. Mid-Plains asked the FCC to declare that (i) the Separations Manual provides the exclusive means for separating a carriers interstate and intrastate costs, and (ii) the residual methodology adopted by the Wisconsin Public Service Commission violates both the Commission's orders and other longstanding legal precedent. The proceeding was assigned FCC Docket No. AAD 9-1939. The Mid-Plains petition places in issue the same LEC practice addressed by NARUC's request for clarification. Notice of the Mid-Plains petition was published in the Federal Register and interested parties, including NARUC have had an opportunity to comment.

Accordingly, should the FCC finds that the requested clarification does not qualify as an APA interpretive rule, general statement of policy, or rule of agency organization, procedure, or practice, (i) the APA notice and comment requirements have been satisfied by the procedures adopted in FCC Docket No. AAD 9-1939, and (ii) Docket No. AAD 9-1939 is an appropriate forum to provide the requested clarification.

**C. Alternatively, should the Commission determine that clarification and/or interpretation of the current Part 69 rules is not appropriate, NARUC petitions the Commission to initiate the correct rulemaking procedures, on an expedited basis, to amend Part 69 to assure consistency between the intra- and interstate jurisdictional settlement costs utilized by individual LECs.**

If the Commission determine that both (i) the requested clarification does not qualify for treatment under APA Section 553(b)(A), and (ii) action in Docket No. AAD 9-1939 is not appropriate, then, based on the discussion in Part A, supra, NARUC petitions the Commission to initiate the correct rulemaking procedures, on an expedited basis, to amend Part 69 to assure consistency between the intra- and interstate jurisdictional settlement costs utilized by individual LECs

## IV.

## CONCLUSION

In accordance with its July 1990 resolution, NARUC respectfully requests the Commission to issue a clarification of its Part 69 regulations indicating that LECs must settle interstate jurisdictional costs on the same basis it utilizes to settle its State-regulated intrastate costs, i.e., on either an "actual cost" or "average schedule" basis.

Alternatively, should the Commission determine that neither (i) clarification and/or interpretation of the current Part 69 rules, or (ii) action in Docket No. AAD 9-1939, is appropriate, NARUC petitions the Commission to initiate the correct rulemaking procedures, on an expedited basis, to amend Part 69 to assure consistency between the intra- and interstate jurisdictional

settlement costs utilized by individual LECs.

Respectfully submitted,

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Undocketed

APPENDIX A

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONER'S

1988, 1989, AND 1990 RESOLUTIONS

CONCERNING MIXED SETTLEMENT COMPANIES

## Resolution For Uniformity in Cost Allocations

WHEREAS, When the same plant and equipment are used to provide both intrastate and interstate telephone service, costs must be apportioned between the federal and state jurisdictions in order to establish fair rates; and

WHEREAS, The Federal Communications Commission (FCC) permits certain local exchange carriers to separate their interstate costs on the basis of average schedules; and

WHEREAS, Some of these average schedule companies conduct and file cost studies for the purpose of separating their intrastate costs; and

WHEREAS, The practice of using two different methods of separating costs--average schedules at the federal level and cost studies in the state jurisdiction--precludes the uniform apportionment of costs; and

WHEREAS, As a result of these practices, some carriers are able to recover, on a combined basis, more than 100 per cent of their total costs; and

WHEREAS, No carrier has a legal or equitable right to recover more than its total costs; now, therefore, be it

RESOLVED, That the Executive Committee of the National Association of Regulatory Utility Commissioners (NARUC), assembled in its 1988 Summer Meeting in San Diego, California, urges the Federal-State Joint Board in CC Docket No. 80-286 to consider this issue, and requests that the the Joint Board report the results of its consideration to the Committee on Communications at the 1989 NARUC Winter Committee Meetings; and be it further

RESOLVED, That a copy of this resolution be transmitted to each member of the Federal-State Joint Board in Docket 80-286 for their consideration and approval.

Sponsored by the Committee on Communications
Adopted July 27, 1988

Resolution Accepting the Report of the Joint Board Staff on Cost Allocation

WHEREAS, On July 25,1988, the Executive Committee of the National Association of Regulatory Utility Commissioners (NARUC), assembled at its 1988 Summer Meeting in San Diego, California, adopted a resolution on cost allocation; and

WHEREAS, The resolution recognized that some local exchange telephone companies are using the average schedules to determine their interstate revenue requirements while using cost studies to establish their intrastate costs, and, as a result of this practice, these carriers are able to recover, on a combined basis, more that 100% of their total costs; and

WHEREAS, This issue has recently been litigated in Tennessee and Wisconsin, has been raised in other States, and is a matter of potential concern to any State that regulates an average schedule exchange carrier; and

WHEREAS, The resolution requested the Federal-State Joint Board in CC Docket No. 80-286 to consider this problem and report the results of its consideration to the Committee on Communications at the NARUC Winter Meeting; and

WHEREAS, A letter from Gerald Brock, Chief of the FCC Common Carrier Bureau, states that the FCC refrains from expressing an opinion regarding the merits of any particular State method for setting intrastate rates; and

WHEREAS, The "residual" or "total company" approach allows a State to ensure that the intrastate costs of an average schedule carrier are determined in a manner consistent with the determination of the carrier's interstate cost; now, therefore, be it

RESOLVED, That the Executive Committee of the National Association of Regulatory Utility Commissioners, assembled at its 1989 Winter Meeting in Washington, D.C., commends the Joint Board State staff representatives for their satisfactory resolution of this problem; and be it further

RESOLVED, That the NARUC General Counsel is directed to send to all NARUC members a copy of the report filed by the Joint Board Staff on this resolution.

Sponsored by the Committee on Communications
Adopted March 1, 1989

## Resolution Concerning Mixed Settlement Companies

**WHEREAS,** *The purpose of settlements, interstate and intrastate access/toll plus ocal, is to reimburse a Local Exchange Company (LEC) completely and fairly for its costs in providing interstate and intrastate telephone services; and*

**WHEREAS,** *Average schedule settlements were developed for the specific purpose of determining jurisdictional allocation while recognizing that some small companies should not incur the burden of performing cost studies, and do not reflect an individual LEC's actual costs; and*

**WHEREAS,** *If a LEC is an average schedule company for interstate settlement purposes and a cost company for intrastate settlement purposes, or vice versa, the LEC may be recovering more than its total costs from access/toll plus local services; and*

**WHEREAS,** *The Executive Committee of the NARUC passed a resolution first acknowledging this issue at its 1988 Summer Committee Meeting in San Diego, California; and*

**WHEREAS,** *The Executive Committee of the NARUC passed a second resolution commending the FCC for their forbearance in this issue at its 1989 Winter Meeting in Washington, D.C.; and*

**WHEREAS,** *The LECs have once again asked the FCC to address this issue in the Mid-Plains Petition; and*

**WHEREAS,** *This problem does not occur if a LEC uses either average schedule for settlements in both jurisdictions or uses cost for settlements in both jurisdictions and only occurs when a LEC uses average schedule for settlements in one jurisdiction and cost for settlements in the other jurisdiction; and*

**WHEREAS,** *Any LEC that is on cost settlements for either jurisdiction, by definition, has both its interstate and intrastate separations costs which could be used for cost settlements in both jurisdictions; and*

**WHEREAS,** *There is still a need for the average schedule settlement process for those LECs that are not able to do a cost study and/or are so small that the expense of doing ongoing cost studies for settlements would be prohibitive; and*

**WHEREAS,** *If the FCC grants the Mid-Plains Petition it could cause significant overearnings by the LEC to the detriment of all ratepayers, including the local ratepayer; now, therefore, be it*

**RESOLVED,** *That the Executive Committee of the National Association of Regulatory Utility Commissioners (NARUC), assembled at its 1990 Summer Committee Meeting in Los Angeles, California, directs the NARUC to continue to work with the FCC*

*to insure that no LEC recovers more than its total costs in providing interstate and intrastate access/toll plus local telephone service; and be it further*

**RESOLVED,** *That the NARUC urges each State commission with a LEC using a mixed settlement arrangement for interstate and intrastate access/toll settlements, to take whatever steps are necessary to require each affected LEC to use only one form of settlements for any given study area, average schedule or cost, in both jurisdictions; and be it further*

**RESOLVED,** *That the NARUC General Counsel petition the FCC to take necessary action to resolve this problem by requiring that for any given study area, a LEC that settles on average schedule in the State jurisdiction must also settle on average schedule in the interstate jurisdiction and that a LEC that settles on cost in the State jurisdiction must also settle on cost in the interstate jurisdiction.*

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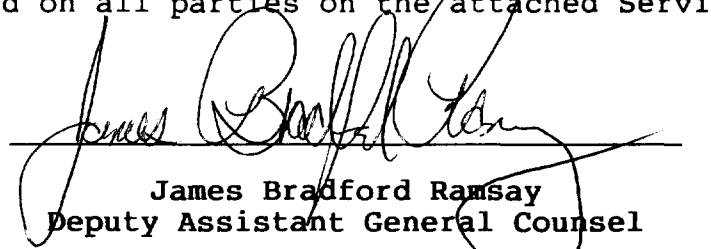
*Sponsored by the Committee on Communications*
*Adopted July 25, 1990*

In the Matter of Clarification/Amendment of Part 69, Uniform System of Accounts for Telecommunications Companies Concerning Average Schedule Eligibility Status.

Undocketed

CERTIFICATE OF SERVICE

I, JAMES BRADFORD RAMSAY, certify that a copy of the foregoing was served on all parties on the attached Service List.



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November 8, 1990

**In the Matter of Clarification/Amendment of Part 69, Uniform System of Accounts for Telecommunications Companies Concerning Average Schedule Eligibility Status.**

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